IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KHA DANH MAGERS, Appellant.	No. 33323-6-II UNPUBLISHED OPINION

ARMSTRONG, J. -- Kha Danh Magers appeals his convictions for second degree assault and unlawful imprisonment; he also appeals his life sentence without the possibility of parole. Magers argues that the trial court erred in various evidence rulings, including allowing evidence of his prior misconduct to show the victim's fear during the assault and to show that she recanted her original story of the assault because she feared Magers. He also contends that the State committed misconduct during opening and closing arguments. Finally, he maintains that his sentence is cruel and unusual punishment and violated his right to trial by jury. We agree that the trial court erred in admitting the prior misconduct evidence. And because the error was not harmless, we reverse and remand for a new trial.

FACTS

Kha Magers and Carissa Ray lived together occasionally for several years during which Magers and Ray had two children. The police arrested Magers in December 2003 for domestic violence. He was released the next day with a protective order prohibiting contact with Ray.

One evening in January 2004, Ray's stepfather called 911 to report that Magers was threatening Ray. When Officer Jim Lang arrived at Ray's home, Ray told him that Magers was not inside. But when he took her away from the house, she changed her story. She was crying, and saying repeatedly that Magers was violent and that he was going to hurt her. She said that Magers had held a sword to the back of her neck and said, "If you listen to me and do what I say, we'll be happy. But if you do not, I'm going to be mean, and I will cut off your head." Report of Proceedings (RP) at 442-43. The threats continued for several hours and although Magers allowed her to go to the store, he kept the children as hostages.

The State charged Magers with second degree assault, unlawful imprisonment, and violation of a no-contact order. He had previously been convicted of two counts of second degree assault, occurring on the same date, and one count of first degree burglary. He was advised that a conviction for the present incident would be his "third strike" under the Persistent Offender Accountability Act. Clerk's Papers (CP) at 4.

A few days after the incident, Ray wrote the prosecutor, recanting her statements to Officer Lang. She recanted again a month later, explaining that Magers had done nothing wrong and that the incident began as a fib to her parents.

Before trial, the defense moved to exclude Ray's statements to Officer Lang as hearsay, Magers's prior convictions, and his arrest for domestic violence as propensity evidence. The trial court admitted the prior misconduct, ruling that

it was relevant to prove an element of the assault charge--that Ray's fear of bodily injury was reasonable--and because it was relevant to Ray's credibility, demonstrating her fear of Magers as a motive to change her story.

On the witness stand, Ray explained that she had developed a pattern of lying to maintain her relationship with her mother while avoiding contact with the stepfather she said sexually molested her as a child. She had asked Magers to come to her house, despite the no-contact order, because she had a job interview and had no one else to watch the children. Then her parents called, asking her to visit them, and she claimed that Magers would not let her go. When she went to the store, she called her mother and embellished the story. Then, when the police arrived, she was afraid she would be in trouble for violating the no-contact order and possibly lose custody of her children, so she continued with the lie.

When the State asked Ray about Magers's December domestic violence arrest, Ray claimed that Magers had simply put his hand on her back. The State then used Ray's handwritten statement in the police report to refresh her recollection that she had claimed Magers had pushed her and that police officers had seen him push her. The officers who investigated the domestic violence incident did not testify.

After Ray's testimony, the State called Officer Lang. The trial court admitted Ray's statements to him as excited utterances. Although much of his description of Ray's demeanor occurred outside the jury's presence during this admissibility determination, the jury did hear Officer Lang say that from Ray's demeanor he knew "something was terribly wrong" and that Ray was "obviously traumatized." RP at 409, 436.

The jury convicted Magers on all three counts and the court sentenced him to life

imprisonment without the possibility of parole.

ANALYSIS

I. Prior Bad Acts

Magers argues that evidence of his prior bad acts was improperly admitted and that the jury was improperly instructed that it could consider these acts as relevant to Ray's credibility. Two acts of prior misconduct were admitted: First, Ray testified that Magers was in jail for "fighting" at the time their first child was born. RP at 263. Second, Ray testified about Magers's December arrest for domestic violence against her. The trial court offered two reasons for admitting evidence of Magers's violent history: (1) Ray's knowledge of the history was evidence that she reasonably feared bodily injury during the assault, a necessary element of second degree assault, and (2) Ray recanted her original statements because she was afraid of Magers; thus the history was relevant to her credibility.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.'" *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). We may affirm on any ground the record adequately supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Magers bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983).

A. State of Mind

The State argues that evidence of Magers's past violent acts was admissible to show that Ray's fear of bodily harm was reasonable. Prior misconduct may be admitted to prove a mental element of a crime. *See State v. Powell*, 126

Wn.2d 244, 261-62, 893 P.2d 615 (1995); *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000); *State v. Ragin*, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999). But the evidence must be necessary to prove a material issue. *Powell*, 126 Wn.2d at 262. For example, in *Powell*, the defendant was accused of murdering his wife. The trial court admitted evidence of the couple's violent relationship, overruling the defense's ER 404(b) objection on the ground that the evidence was relevant to show the defendant's motive, intent, and opportunity. We reversed, holding that intent and opportunity were not disputed issues and that evidence of prior quarrels and abuse was not evidence of motive but only of a propensity to abuse. *Powell*, 126 Wn.2d at 255-56. Although the Supreme Court reversed on the ground that evidence of animosity between the two was relevant both to motive and to the res gestae, it agreed that intent and opportunity were improper grounds for admission. *Powell*, 126 Wn.2d at 262-63. Regarding intent, the court explained that the defendant's intent was not in dispute and that intent was implicit in the act of manual strangulation. *Powell*, 126 Wn.2d at 262.

Likewise, proof that Magers held a sword to the back of Ray's neck threatening to decapitate her is strong evidence that she reasonably feared bodily injury, but Magers never disputed this element. Thus, the victim's state of mind was not a proper basis for admitting the evidence.

The State relies on *Barragan* and *Ragin* to support the trial court's ruling admitting the evidence. *Ragin* is inapposite. That case involved a defendant charged with felony harassment for making threats over the phone from jail. *Ragin*, 94 Wn. App. at 410. Evidence that the victim was aware of the defendant's violent history was necessary for the jury to understand why it was reasonable for the victim to take this remote threat seriously. *Ragin*, 94 Wn. App. at 412. The reasonableness of the fear was not implicit

in the act of a threat over the phone while in law enforcement custody.

Barragan is closer to our case. While it was also a felony harassment case, the defendant and the victim were together in a jail cell at the time of the threats, and the threats were accompanied by physical altercations. *Barragan*, 102 Wn. App. at 757. In affirming the trial court's admission of the defendant's violent history, Division Three held that the jury was entitled to know what the victim knew about the defendant to assess whether it was reasonable for the victim to believe the defendant would carry out his threats. *Barragan*, 102 Wn. App. at 759. The court did not explain why, or even whether, the reasonableness of the victim's fear was in dispute. To the extent the opinion can be interpreted to mean there is no requirement that the element be in dispute, *Barragan* conflicts with *Powell.* We hold that the trial court erred in admitting evidence of Magers's prior misconduct to show Ray's state of mind at the time of the threat.

B. Credibility

The State also argues that the prior misconduct was admissible to cast doubt on Ray's credibility at trial under the theory that she recanted her initial statements because she was afraid of Magers's retaliation. Evidence of past domestic violence may be admissible when the victim changes her testimony. *See State v. Cook*, 131 Wn. App. 845, 851, 129 P.3d 834 (2006); *State v. Grant*, 83 Wn. App. 98, 106, 920 P.2d 609 (1996).

The State relies on *Grant.* There, the defendant threatened the victim that she "would regret it" if she identified him as her attacker. *Grant*, 83 Wn. App. at 102. Initially, she complied, but when police got her away from the defendant, she changed her story. *Grant*, 83 Wn. App. at 102. At his trial for domestic violence felony violation of a post-sentence court order, the prosecution sought to introduce evidence of his prior assaults against the victim. The trial court ruled that ER 404(b) prohibited the evidence,

but admitted it under ER 609(a) to impeach the defendant's credibility as a witness. *Grant*, 83 Wn. App. at 103. On appeal, Division One expressed skepticism as to whether the evidence was admissible for impeachment, but it held that any error was harmless because the evidence was admissible under ER 404(b). *Grant*, 83 Wn. App. at 105. The court explained that, because of the psychological effects of domestic violence, evidence of a violent relationship was admissible to explain the victim's seemingly inconsistent acts, such as changing her story to the police and seeing the defendant despite the no-contact order. *Grant*, 83 Wn. App. at 106-07.

Grant's applicability is limited by our recent decision in *Cook*. The victim there, O'Brien, initially reported to police that the defendant, Cook, had kicked her and broken her finger during an argument at home. Later, she recanted this testimony in a letter, claiming to have broken the finger accidentally; she testified to the broken finger at trial also. *Cook*, 131 Wn. App. at 848. Because O'Brien's credibility was central to the case, the trial court allowed evidence of the defendant's past violence toward the victim, with the following limiting instruction:

> Evidence has been introduced in this case on the subject of prior incidents of domestic violence between Ms. O'Brien and Mr. Cook for the limited purpose of assessing the credibility of (witness) Cindy O'Brien. You must not consider this evidence for any other purpose.

Cook, 131 Wn. App. at 849. On appeal, we disagreed with *Grant* that prior domestic violence "evidence should be considered by the jury for the generalized purpose of assessing the victim's credibility." *Cook*, 131 Wn. App. at 851. Instead, we held that such evidence may be admissible "to [assess] the victim's state of mind at the time of the inconsistent act." *Cook*, 131 Wn. App. at 851.

We explained that an instruction limiting consideration of the evidence to credibility invites

the jury to find the victim's testimony not credible because the defendant's past violence against her makes it more likely that he committed violence against her at the time in question. *Cook*, 131 Wn. App. at 853. Thus, admitting the evidence with this type of instruction was error. The appropriate limiting instruction would have admonished the jury to consider the evidence only to assess the victim's state of mind at the time of an inconsistent act such as a trial recantation. *Cook*, 131 Wn. App. at 853-54.

Accordingly, although Magers's past violence against Ray may have been admissible, the general instruction to consider prior bad acts to assess Ray's credibility was error. And we are not persuaded by the State's argument that the defense invited this error by proposing the instruction. Defense counsel repeatedly stated that she was neither proposing nor agreeing to the instruction but, rather, had drafted it for the convenience of the parties, based on the trial court's ruling. The prosecutor acknowledged that the defense was not agreeing to including credibility in the instruction. The trial court entered this instruction after defense counsel extensively argued against it. The defense adequately preserved the error.

Moreover, the cases support admitting evidence of violence only against the victim. *Powell* allowed evidence of a violent relationship between the defendant and the victim to establish the res gestae and the defendant's motive for murder. *Grant* and *Cook* allowed evidence of the defendants' past violence against the victims to explain inconsistencies in the victims' statements. Although *Barragan* and *Ragin* allowed evidence of violence against persons other than the victims, as discussed, these cases do not apply here. Thus, there was no legal basis for eliciting from Ray that Magers had previously been in jail for fighting.

Finally, the error was prejudicial. An erroneous evidentiary ruling requires reversal if there is a reasonable probability that the

evidence materially affected the trial result. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). In *Cook*, we found that the admission of prior violence against the victim with an inadequate limiting instruction required reversal. *Cook*, 131 Wn. App. at 854. Here, the error was compounded by erroneous admission of violent acts not against the victim. We reverse and remand with instructions that the "fighting" not be admitted and that the evidence of domestic violence against Ray be accompanied by an instruction consistent with *Cook*.

II. Hearsay

Magers argues that the trial court erred in admitting the police reports of officers who had witnessed the prior act of domestic violence against Ray. In addition, Magers challenges the court ruling admitting Ray's out-of-court statements to law enforcement officers as excited utterances.

A. The December Police Reports

The trial court allowed the State to use the police report from the December incident during Ray's testimony. Because the officers who took the report did not testify, Magers claims his right to confrontation was violated. It is constitutional error to admit testimonial hearsay in a criminal trial unless the declarant is unavailable and the defense has had a prior opportunity to cross-examine the declarant regarding the statement. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence." *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). But a party may raise a manifest constitutional error for the first time on review. RAP 2.5(a)(3); *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury

would have reached the same result in the absence of the error. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

Contrary to Magers's assertion, the officers' statements in the report were not admitted. Rather, the report was handed to Ray on the stand to refresh her memory. The portion used was her handwritten statement. Because Ray testified at trial, *Crawford* does not prohibit admitting her own words. The only part of Ray's testimony that could be construed as using the arresting officers' hearsay is her statement that she remembered "them saying that he was pushing me and I explained to them that he wasn't." RP at 278-79. This statement does not warrant reversal for two reasons. First, the defense did not object. Because it is unclear whether Ray's memory of what the officers told her is "testimonial," any error is not manifestly constitutional. Second, because Ray's handwritten statement said that Magers had pushed her, any error in allowing her to say that the officers said he pushed her was harmless beyond a reasonable doubt.

B. Excited Utterance

Ray's testimony at trial that the incident never occurred was contradicted primarily by Officer Lang's testimony of what Ray told him at the scene. The court admitted Ray's statements under the excited utterance exception to the hearsay rule.

We review a trial court's determination that a hearsay exception applies for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). ER 803(a)(2) allows hearsay as an excited utterance if (1) a startling event has occurred, (2) the statement was made while the declarant was under the stress of the event, and (3) the statement related to the event. *State v. Lawrence*, 108 Wn. App. 226, 234, 31 P.3d 1198 (2001). The rationale for this exception is that a spontaneous response to actual sensations is more likely to be sincere and not based on reflection or self-interest. *State v.*

Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

Magers relies on *Brown* for his argument that Ray's initial lie to the police, stating that Magers was not inside the house, dispels the notion that Ray had no time for fabrication and therefore could not have made excited utterances. In *Brown*, the Supreme Court found error in the trial court's excited utterance admission because the declarant admitted that she had deliberately fabricated a portion of the hearsay statement. *Brown*, 127 Wn.2d at 758-59. The Supreme Court has since explained, however, that a lack of honesty does not automatically preclude the excited utterance exception. *See*, *e.g.*, *State v. Woods*, 143 Wn.2d 561, 600, 23 P.3d 1046 (2001) (deliberate omission of details does not mean a statement was not an excited utterance). Here, that Ray lied to police regarding Magers's presence does not mean her later statements were neither spontaneous nor sincere. Rather than a deliberate, planned fabrication as in *Brown*, the lie here could have been interpreted as a reaction to the stress and fear she was feeling at the moment. The trial judge heard Officer Lang's description of Ray's demeanor at the time she made the statements, and this testimony described trauma and shock. The trial court acted within its discretion in finding this testimony credible and admitting the statements as excited utterances.

In conclusion, we hold that the trial court erred in admitting Magers's prior incarceration for "fighting" and in instructing the jury that it could consider Magers's prior misconduct in

evaluating Ray's credibility. Because we cannot say the errors were harmless, we reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, J.